

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Catherine Durand-Graves,

Complainant,

v

Unisys Corporation, a Delaware  
corporation,

Respondent.

ORDER DENYING  
RESPONDENT'S MOTION  
FOR SUMMARY DISPOSITION

This matter came before Administrative Law Judge Steve M. Mihalchick on May 15, 1995, at the Office of Administrative Hearings, 100 Washington Square, Suite 1700, Minneapolis, Minnesota, a Motion for Summary Disposition filed by the Respondent, Unisys Corporation ("Unisys" or "Respondent"). Patricia O. Kiscoan, Popham, Haik, Schnobrich & Kaufman, Ltd., 222 South Ninth Street, Suite 3300, Minneapolis, Minnesota, appeared on behalf of Unisys. Leslie E. Scott, Horton and Associates, 700 Title Insurance Building, 400 Second Avenue South, Minneapolis, Minnesota 55401-2402, appeared on behalf of the Complainant, Catherine Durand-Graves. The record closed on this motion on May 19, 1995, with the receipt of the parties' posthearing briefs.

Based upon all the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

The Respondent's Motion for Summary Disposition is hereby DENIED.

Dated: June \_\_\_\_, 1995.

---

STEVE M. MIHALCHICK  
Administrative Law Judge

## MEMORANDUM

In her Charge of Discrimination, Catherine Durand-Graves asserts that she was subjected to discriminatory treatment and constructively discharged by Unisys on the basis of gender in violation of Minn. Stat. Chap. 363 ("Human Rights Act"). Unisys filed an Answer to the Complaint denying that Durand-Graves was discharged and denying that any employment decision regarding Durand-Graves was made in reference to gender. Complainant asserts that the reasons offered by Unisys for its actions are pretextual. Respondent filed a motion requesting summary judgment.

Summary disposition is the administrative equivalent of summary judgment. Minn. Rule 1400.5500(K). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn.R.Civ.P. 56.03 (1984). A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case. Illinois Farmers Insurance Co. v. Tapemark Co., 273 N. W.2d 630, 634 (Minn. 1978); Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W. 2d 804, 808 (Minn. App. 1984).

The moving party, in this case Unisys, has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary disposition, the nonmoving party, in this case the Complainant, must show that specific facts are in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees, 384 N.W.2d 853, 855 (Minn. 1986). The existence of a genuine issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn.R.Civ.P. 56.05. Id.; Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn.App. 1988). The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial. Carlisle, 437 N.W.2d at 715 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)). The nonmoving party also has the benefit of the most favorable view of the evidence. All doubts and inferences must be resolved against the moving party. See Celotex, 477 U.S. at 325; Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988); Greaton v. Enich, 185 N.W.2d 876, 878 (Minn. 1971); Dollander v. Rochester State Hospital, 362 N.W.2d 386, 389 (Minn.App. 1985).

Based upon the pleadings and affidavits submitted in this matter, and construing the facts in the light most favorable to the Complainant, the underlying facts in this matter appear to be as follows.

Complainant was employed by Burroughs Corp. as a Systems Analyst in database management from 1975 to 1978. She became an Account Representative for Burroughs covering Chicago and Iowa from 1978 to 1981. Durand-Graves was promoted to Branch Manager, based in Davenport, Iowa, in 1981. In both sales

positions she sold software to corporate clients. In 1986, Durand-Graves became the Regional Manager for Major Accounts with Burroughs.

When Burroughs and Sperry merged in 1987, Durand-Graves became a Branch Manager for Manufacturing in the Twin Cities (Minneapolis-St. Paul). She held that position for a year and became the Branch Manager for Major Accounts in 1988. As Branch Manager for Major Accounts, Durand-Graves recruited a sales team and prepared forecasts and sales reports. In 1989, Durand-Graves was recruited to join Sadik Ozoglu as a team in the Airline and Travel Division at Unisys. Durand-Graves was earning a base salary of \$54,000 as a Branch Manager and was bonuses could be earned for making sales quotas. At the time of her transfer, Durand-Graves had closed office space, meaning an office with walls and a door, assigned to her as a Branch Manager.

When Durand-Graves began working for the Airline and Travel Division, she was assigned closed office space. Ozoglu did not have closed office space assigned to him. As the working relationship between Durand-Graves and Ozoglu developed, Durand-Graves offered to have Ozoglu use the office when she was out of the Unisys building. Durand-Graves established a working area in an unused cubicle in the Airline Division section of the Unisys building. Both her name and Ozoglu's name were placed on the office. Nicholas Debronsky was then made Major Accounts Manager for the Airline Division and Durand-Graves was told she was not entitled to a closed office. Debronsky was assigned closed office space.

Unisys has a guideline for assigning office space. Managers at levels 17-19 are entitled to an enclosed office or an open plan office of 120 square feet. Manager/Supervisors at levels 15-19 are entitled to an open plan 96 square foot office.

Durand-Graves and Ozoglu were awarded team of the year honors in 1989. At the awards ceremony, only Ozoglu was mentioned by name.

By the time Debronsky was selected to be Major Accounts Manager for the Airline Division, Durand-Graves had been selling the Sperry 1100/2200 for one and one-half years. She had three years of experience with that system, dating back to her experience as a Branch Manager at Unisys. At the branch manager level, Durand-Graves had two customers using the 1100/2200 mainframe.

While working for Unisys, Durand-Graves and Debronsky had compensation packages with a combination of base salary and commission. Dennis W. Hutton, human resources representative for Unisys described the 1991 packages as including:

	<u>Base</u>	<u>Quota</u>	<u>Commission</u>	<u>Total Earnings</u>
Debronsky	\$60,000	\$11 Million	\$45,000	\$105,000
Durand-Graves	\$54,000	\$5 Million	\$46,000	\$100,000

Hutton described the arrangement for the sale of the 2200 mainframe to NWA as Debronsky receiving 55% commission and Durand-Graves receiving 45 percent commission.

In 1992, the compensation packages changed for Debronsky and Durand-Graves. Hutton described the packages as follows:

	<u>Base</u>	<u>Quota</u>	<u>Commission</u>	<u>Total Earnings</u>
Debronsky	\$60,000	\$8.82 Million	\$45,000	\$105,000
Durand-Graves	\$54,000	\$4 Million	\$51,000	\$105,000

The division of commission for the sale of the 2200 mainframe changed to 70% for Debronsky and 30% for Durand-Graves.

Throughout 1991 and 1992, Debronsky's entire commission was to be based on the sale of the 2200 mainframe. Durand-Graves continued to receive commissions from the sales of software, including the cargo modules, in both 1991 and 1992. In 1991, Durand-Graves earned \$63,754.97. In 1991, Debronsky was paid approximately \$100,000, excluding relocation expenses. In 1992, Durand-Graves earned \$55,836.02. In that year, Debronsky was paid \$109,356.04. There was no sale of the 2200 mainframe in 1992 to justify the payment of any commission.

In March, 1992, Debronsky and several persons from NWA were attending a Unisys User meeting in Denver, Colorado. While in Denver, Debronsky and Del Bloss, Division President for Unisys, played a round of golf. While in the golf cart, Bloss gave Debronsky some "constructive criticism" about how the NWA accounts were being pursued. Bloss advised Debronsky not to rely upon Durand-Graves because of her contacts at NWA and because she did not dress properly. When Debronsky asked for an explanation Bloss told him that "She [Durand-Graves] was always a mess. Dresses too casual, hair's a mess." Debronsky Deposition, at 96.

A planning meeting was held in October or November, 1992, attended by Unisys and NWA employees. After the planning meeting, Bloss buttonholed Debronsky and criticized him for a "dumb question" to one of the NWA employees present at the meeting. Bloss also criticized the way Durand-Graves was dressed, suggesting her suit needed to be cleaned and her hair was mess. Bloss told Debronsky that he saw Durand-Graves touch a client on the knee and that this action angered Bloss. Debronsky defended Durand-Graves and suggested that, if there was a problem, he (Debronsky) should be taken off the account since Durand-Graves could handle the account on her own. Bloss' reaction was to state that Durand-Graves would never be in charge of that account. Debronsky Deposition, at 106-07. Debronsky informed Durand-Graves of Bloss' unhappiness with the NWA team. He did not inform her of the comment that she would never become a Major Account Manager.

One month after the planning meeting, Debronsky was in Chicago, Illinois for a meeting with other Unisys employees. Debronsky requested of Bloss some salary assistance in the form of guarantees for himself and Durand-Graves due to NWA's precarious financial situation. Bloss made no immediate response. Debronsky had a conversation with Adel Barbato, Director of Human Resources, on the same trip. He made the same request of Barbato; for some form of salary guarantee. Barbato criticized the functioning of the NWA team. Debronsky suggested taking himself off of the account, since Durand-Graves could handle the account. Barbato questioned who could take Debronsky's place on the account. Debronsky suggested Durand-Graves and Barbato responded that "Cathy will never be the account manager on Northwest Airlines." Debronsky Deposition, at 123-24. When Debronsky questioned why she could not be an account manager, Barbato identified Durand-Graves' conduct and mannerisms. Debronsky asked if the reason was because Durand-Graves was a woman and Barbato responded: "No, I'm not quite saying that, but there are problems in that area." Id. at 124. Debronsky pressed the question and Barbato responded, "We have our reasons." Id.

Durand-Graves was advised on January 29, 1993, that her salary was being reduced from its current level of \$54,000 to \$51,000 on July 1, 1993, and reduced again to \$48,000 on January 1, 1994. Complainant Exhibit H. The reason given for the reductions was that the Unisys standard for an Account Representative was \$48,000 and her salary was to be brought within that guideline amount.

In February, 1993, Durand-Graves resigned from her position with Unisys. When Durand-Graves informed Debronsky of her decision to resign, she told him about her perception that she had been treated unfairly with regard to office space, been excluded from high level meetings, and been discriminated against on the basis of her gender.

On April 1, 1993, David Johnson joined the Airline Division as a Major Account Manager. On April 6, 1993, John James, District Manager for Unisys, requested enclosed office space be assigned to Johnson. After several months, Johnson was given an enclosed office. Debronsky and Johnson were both working in the Airlines Division on the NWA account as Major Account Managers.

Johnson's work history before coming to Unisys included five years with Burroughs as a Marketing Representative; two years with PBS Computing, starting as an area sales manager and ending as a Branch Manager; and one year as a District Manager for Oracle Corporation. The position Johnson held immediately before joining Unisys was as Senior Marketing Representative for Management Science America, Inc. In that position, Johnson sold software. Johnson had no experience selling the 2200 mainframe prior to joining Unisys.

In early 1993, Durand-Graves negotiated with Bob Smith, a Vice President for Unisys, in an effort to arrive at a favorable severance package. On January 31, 1993, Durand-Graves completed an application with Stratus Computers. In that application, Durand-Graves gave her reason for leaving Unisys as "earning potential." Kiscoan Affidavit, Exhibit D.

After leaving Unisys, Durand-Graves became an Account Executive with Stratus Computers. She had learned about Stratus from a professional recruiter (commonly known as a "headhunter") who contacted Durand-Graves in September, 1992. When Durand-Graves met with the recruiter in 1992, she indicated that she was open to other opportunities, but she was committed to Unisys. Durand-Graves Deposition, at 91-92. Stratus sells platform computers to major clients.

The Human Rights Act specifies that, except under limited circumstances, it is an unfair employment practice for an employer to discharge an employee because of gender or otherwise discriminate against an employee because of gender with respect to "hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment." Minn. Stat. § 363.03, subd. 1(2) (1992).

Minnesota courts have often relied upon federal case law developed in discrimination cases arising under Title VII of the Civil Rights Act of 1964 in interpreting the Human Rights Act. Relevant Minnesota case law establishes that plaintiffs in employment discrimination claims arising under the Human Rights Act may prove their case either by presenting direct evidence of discriminatory intent or by presenting circumstantial evidence in accordance with the analysis first set out by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). Feges v. Perkins Restaurants, Inc., 483 N.W.2d 701, 710 and n. 4 (Minn. 1992); Sigurdson v. Isanti County, 386 N.W.2d 715, 719 (Minn. 1986); Danz v. Jones, 263 N.W.2d 395, 399 (Minn. 1978).

The approach set forth in McDonnell Douglas consists of a three-part analysis which first requires the complainant to establish a prima facie case of disparate treatment based upon a statutorily-prohibited discriminatory factor. Once a prima facie case is established, a presumption arises that the respondent unlawfully discriminated against the complainant. The burden of producing evidence then shifts to the respondent, who is required to articulate a legitimate, nondiscriminatory reason for its treatment of the complainant. If the respondent establishes a legitimate, nondiscriminatory reason, the burden of production shifts back to the complainant to demonstrate that the respondent's claimed reasons were pretextual. McDonnell Douglas, 411 U.S. at 802-03; see also Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 623 (Minn. 1989); Hubbard v. United Press International Inc., 330 N.W.2d 428 (Minn. 1983).

Indirect proof of discrimination is permissible to show pretext, since "an employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred." Haglof v. Northwest Rehabilitation Inc., 910 F.2d 492, 494 (8th Cir. 1990), quoting MacDissi v. Valmont Industries Inc., 856 F.2d 1054, 1059 (8th Cir. 1988). The burden of proof remains at all times with the complainant. Fisher Nut Co. v. Lewis ex rel. Garcia, 320 N.W.2d 731 (Minn. 1982); Lamb v. Village of Bagley, 310 N.W.2d 508, 510 (Minn. 1981).

The law is clear that the three-part McDonnell Douglas analysis is to be applied in deciding summary judgment motions involving claims alleging disparate treatment in violation of the Human Rights Act. Albertson v. FMC Corp., 437 N.W.2d 113, 115 (Minn.App. 1989), citing Sigurdson v. Isanti County, 386 N.W.2d 715, 719-22 (Minn. 1986); see also Rademacher v. FMC Corp., 431 N.W.2d 879, 882 (Minn.App. 1988); Shea v. Hanna Mining Co., 397 N.W.2d 362, 368 (Minn.App. 1986). The U.S. Court of Appeals for the Eighth Circuit has cautioned that "[s]ummary judgments should be sparingly used [in cases alleging employment discrimination] and then only in those rare instances where there is no dispute of fact and where there exists only one conclusion ... All the evidence must point one way and be susceptible of no reasonable inference sustaining the position of the non-moving party." Johnson v. Minnesota Historical Society, 931 F.2d 1239, 1244 (8th Cir. 1991)(relying upon Hillebrand v. M-Tron Industries Inc., 827 F.2d 363, 364 (8th Cir. 1987), cert. denied 488 U.S. 1004 (1989); and Holley v. Sanyo Manufacturing, Inc., 771 F.2d 1161, 1164 (8th Cir. 1985).

The elements of a prima facie case of discrimination vary depending upon the type of discrimination alleged, and must be tailored to fit the particular circumstances. Ward v. Employee Development Corp., 516 N.W.2d 198, 201 (Minn.App. 1994). The Complainant's claims in the present case fall into the primary category of different treatment taken against a female employee on the basis of gender. Durand-Graves alleges the different treatment was so severe as to render intolerable her continuing in the Respondent's employ. In order to demonstrate a prima facie case of gender discrimination in discharge or terms and conditions of employment, the Complainant must show she is member of a protected class, she is qualified for the position, an adverse action was taken against her, and that a male employee in that position was treated more advantageously. Id.

Based upon the application of the standards set forth above and construing the evidence in a light most favorable to the nonmoving party, the Administrative Law Judge concludes that Durand-Graves has presented sufficient evidence to support a prima facie case of gender discrimination. Complainant was the only woman working at the level of Account Representative at the Airline Division at Unisys. Prior to 1991, Durand-Graves had an excellent record of success in sales of computer products. Negative salary actions were taken in 1992 and 1993 to decrease Durand-Graves' compensation.

Unisys argues that all differences between Durand-Graves compensation and other members of the Airline Division are based on the differences in the positions held. Unisys asserts as an undisputed fact "that Debronsky was answerable to management in a way that Durand-Graves was not." Unisys May 19, 1995 Memorandum, at 5. Unisys relies upon this difference in job duties to support its claim that there are no facts supporting a finding of pretext in this matter. In her deposition, Durand-Graves indicated that her job duties were identical to those of Ozoglu, except that he was the "point man" on the account. Durand-Graves Deposition, at 259-60. The only different job duties identified between Durand-Graves and Debronsky were the preparation of a spreadsheet, based on a spreadsheet prepared by Durand-Graves, and being answerable to management. Id. at 259. Durand-Graves asserts that these same

differences existed between herself and Ozoglu and they were treated as partners. Id. at 259-60.

More fundamentally, Respondent's argument on this issue would require acceptance of the assertion by Unisys that Durand-Graves was not discriminated against in establishing the duties of her position. On a motion for summary judgment, all inferences must be taken in favor of the nonmoving party. The Respondent cannot rely upon an assumption that it acted in good faith when that good faith is a genuine issue in this matter and independent evidence supports a finding of pretext.

In some job specifics, Durand-Graves performed duties strikingly similar to those of Debronsky. Durand-Graves prepared spreadsheets which were merged with other information by Debronsky to compose the Airlines Division report. Debronsky characterized his responsibility on the 2200 mainframe as 50%-50% with Durand-Graves. Over the period from 1991 to her departure in February, 1993, Durand-Graves was informed that her base salary would be reduced, the percentage of commission compensation on the 2200 mainframe project was reduced from 45% to 30%.

After Durand-Graves left her position with Unisys, David Johnson joined the NWA project team. Johnson's title was Major Account Manager. The reasons set forth for hiring Johnson were his maturity, prior sales successes, and strategic sales techniques. The reasons for promoting Johnson to level 17 and giving him the title of Major Account Manager were set forth as 1) his leaving a position with lucrative accounts; 2) his history of successful sales; and 3) the earning potential that his new position offered. His background was almost exclusively in computer software. There is no evidence that Johnson had any experience in selling large computer systems. Johnson's experience, based on the information in the record, was inferior to that of Durand-Graves.

Respondent has advanced legitimate, nondiscriminatory reasons for any differential treatment experienced by Durand-Graves. Durand-Graves held a different title than the Debronsky, whose compensation and terms of employment are used as a comparison. Different job titles can legitimately have different salaries and working conditions. The primary project of Durand-Graves' sales team was completing the sale of the 2200 mainframe computer to NWA. That project remained uncompleted through the time Durand-Graves worked for Unisys. Unisys is entitled to make personnel decision based on performance.

Since the Respondent has presented legitimate, nondiscriminatory reasons for its actions, the burden shifts to the Complainant to produce facts that show that there are genuine issues of material fact as to whether these reasons are a pretext for discrimination. Debronsky has presented deposition testimony that he asked management to divide equally the responsibility for the mainframe sale between himself and Durand-Graves. Debronsky also expressed his opinion that Durand-Graves' performance was at his level and she should have an equivalent title. The opinion of a coworker is not dispositive on the issue of pretext. Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1125 (7th Cir. 1993). However, the response from both Barbato



and Bloss was that Durand-Graves would “never be a Major Account Manager.” The meaning of this statement is a genuine issue of material fact. Stating that an employee will never rise to the next level is inconsistent with measuring that employee’s performance to gauge promotions. Such a statement is consistent with an employer judging an employee by impermissible factors, such as gender or race. This issue can only be resolved by taking testimony, assessing credibility, and making findings.

Beyond the issue discussed in the foregoing paragraph, the application of position titles at Unisys is not accompanied by the uniform application that affords a presumption of reliability. The deposition testimony of Debronsky suggests that position titles are assigned to reflect the status of the individual, not place an individual in an existing position. This approach is supported by the fluctuations in the composition of the NWA sales team from 1989 to 1993. The only high-level salesperson on the team throughout was Durand-Graves. The explanations offered as to why she was not afforded more responsibility are inconsistent with her performance in selling computer software modules to NWA. The level of objectivity applied in assigning job titles and the extent to which such assignments are based on impermissible factors are genuine issues of material fact in this matter.

Unisys points to the mathematical similarity between the total potential compensation package of Debronsky and Durand-Graves and the higher quota level imposed on Debronsky, as evidence that Durand-Graves was being compensated at a level higher than Debronsky. Looking behind those numbers, however, the quota for Debronsky would be fulfilled with the sale of only one item, the 2200 mainframe. Durand-Graves quota would be filled with the sale of that same item, together with the sales made in the “cargo area.” Debronsky characterized the effort on the sale between himself and Durand-Graves as 50%-50%. In addition, Debronsky was actually compensated in a dollar amount far higher than Durand-Graves. Taking this evidence in the light most favorable to the nonmoving party, as the Judge must on a motion for summary judgment, Durand-Graves was being compensated at a level significantly below that of Debronsky for comparable work. Whether the differences in the compensation packages arose from an impermissible factor is a genuine issue of material fact.

All of the factors identified by Unisys for giving Johnson the position of Major Accounts Manager would justify giving Durand-Graves the position of Major Accounts Manager when Ozoglu left the Airlines Division. Applying those same factors during the three times Durand-Graves or Debronsky asked that she be promoted to that position would justify giving her the promotion to Major Accounts Manager. In a hearing on discrimination, if the reasons asserted do not support the actions taken a judge may infer that the employer is providing a mere pretext for discrimination. St. Mary’s Honor Center v. Hicks, 113 S.Ct. 2742, 2749 (1993). On a motion for summary disposition by the employer, however, all inferences must be taken in favor of the employee. Thus, in this procedural posture, the Judge must infer that the reasons given are pretextual. Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1124 (7th Cir. 1993).

Unisys argues that part of the reason for giving Johnson the Major Accounts Manager title and an enclosed office is that he negotiated for these terms of employment. There does not appear to be any distinction between Johnson negotiating for an enclosed office and Durand-Graves moving from her enclosed office as a Branch Manager to an enclosed office in the Airlines Division. That aspect of her working environment appears to have been negotiated, along with retaining her current base salary. Unisys argues that Durand-Graves was “technically” maintained at level 17 to justify giving her an enclosed office. Unisys has introduced no evidence to show that this “technicality” was memorialized or was of limited duration. Since the standard base salary for Account Executives is below Durand-Graves starting salary when she became an Account Executive, the inference to be taken is that Unisys negotiated those terms with Durand-Graves. Unisys must present a reason for changing those terms beyond simply restating the entitlements of an Account Executive.

Unisys argues that Durand-Graves has not introduced any facts to support her contention that she was constructively discharged. She was repeatedly denied the position title of Major Account Manager from 1991 to 1993. Durand-Graves had negative compensation actions taken against her in 1992, when her percentage on any sale of the 2200 mainframe was reduced to 30%, and again in 1993, when her base salary was to be reduced by \$6,000. Durand-Graves was denied enclosed office space that she had negotiated for when she took the job. Durand-Graves was criticized for her manner of dress and her mannerisms. The persons who would need to concur for Durand-Graves to receive a promotion were inexorably opposed to any advancement for her.

Unisys maintains that the test for constructive discharge is whether the employer has engaged in conduct that a reasonable employee would consider intolerable and the employer intended that the employee resign. Smith v. Goodyear Tire & Rubber Co., 895 F.2d 467, 472 (8th Cir. 1990); see also Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2nd Cir. 1983). In Goodyear, the termination came in wake of a valid reduction in force. In Pena, the court noted that there was neither a loss of pay or change in title. The Minnesota Court of Appeals has set out a different measure for constructive discharge:

Constructive discharge occurs where an employee resigns to escape intolerable working conditions. Continental Can Co. v. State, 297 N.W.2d 241, 251 (Minn. 1980).

Huyen v. Driscoll, 479 N.W.2d 76, 81 (Minn.App. 1991).

The Minnesota Court of Appeals has not included an intent requirement for constructive discharge under the Human Rights Act and such a requirement would be inconsistent with many employment situations where discrimination is present.

Durand-Graves has alleged physical ailments arising out of the stress she suffered between 1991 and 1993. Until coming to the Airline Division, Durand-Graves had an unbroken record of success. She aspired to continue improving her position and

increasing her compensation. Given her background, a reasonable employee could find a “glass ceiling” intolerable. The NWA team was subjected to criticism of a questionable basis, both in performance and style. When she was denied closed office space and her base salary was decreased, Durand-Graves could reasonably find the situation intolerable.

Even if an intent requirement is imposed, however, there are material issues of genuine fact as to whether Unisys intended that Durand-Graves leave its employment. One can infer from the negative actions taken against Durand-Graves that Unisys was encouraging her to leave. The affording of a superior title, better base salary, and a closed office to her less-qualified successor are all indications that Unisys intended that Durand-Graves to leave her employment. Taking all inferences in favor of the nonmoving party, the facts alleged by the Complainant are sufficient to demonstrate a constructive discharge.

Durand-Graves was in contact with an employment agency in 1992. Unisys asserts that this conduct is inconsistent with a constructive discharge and is consistent with a voluntary termination of employment. Unisys is seeking to have the inferences from facts be taken in its favor instead of the nonmoving party. Seeking other employment is perfectly consistent with an employee finding current working conditions to be less than satisfactory. On the forms filled out for the employment agency, she stated that her reasons for seeking other employment were “career growth/earnings.” Marvin Deposition, Exhibit 1. However, the Judge is not bound to afford these statements unambiguously negative impact on the Complainant’s case. A person seeking new employment is unlikely to advertise that she is about to sue her existing employer for discrimination. Durand-Graves’ concern over her career growth and earnings can certainly arise from the treatment she had received at Unisys. Constructive discharge is a subjective matter and the issue can only be determined in this matter with testimony and findings.

The Administrative Law Judge has concluded that genuine issues of material fact remain for resolution at the hearing and that summary disposition is not appropriate in this matter. Thus, the Respondent's Motion for Summary Judgment has been DENIED.

S.M.M.